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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAMON MACIAS-COLMENARES (1),
DEBRA MIKA (2),
BEATRICE ARANA (3),

Defendants.

Case No. 07CR2916-JAH

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO COMPEL DISCOVERY

DATE: November 19, 2007

TIME: 8:30 a.m.

I.

STATEMENT OF FACTS

A seven count Indictment filed October 19, 2007 charges Defendant Arana and two Co-Defendants with alien smuggling. Specifically, Defendant Arana is charged with three counts of bringing aliens to the United States for financial gain, and three counts of transportation of illegal aliens within the United States. Defendant, Macias-Colmenares, is additionally charged in Count VII with a violation of Title 8 U.S.C. §1326.

Allegedly, border patrol agents observed a group of undocumented aliens walking through the Jacumba Wilderness Mountains and attempt to conceal themselves as they

1 approached Interstate 8. Allegedly, Defendant Arana and Co-Defendant Mika dropped off a
 2 pick-up truck and left the area in a different vehicle. Agents allegedly observed the illegal
 3 aliens enter the truck. When subsequently arrested, Defendant, Arana, was the passenger in a
 4 vehicle that contained no illegal aliens.
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6 II.

7 MOTION TO COMPEL DISCOVERY

8 Defendant moves for discovery that is not limited to those items that the prosecutor
 9 knows of, but rather includes all discovery listed below that is in custody, control, care, or
 10 knowledge of any “closely related investigative (or other) agencies” under the United States v.
 11 Bryan, 868 F.2d 1032 (9th Cir.), cert. denied, 493 U.S. 858 (1989):
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13 (1) **The Defendant’s Statements.** Under Fed. R. Crim. P. 16 (a) (1) (A) the
 14 defendant is entitled to disclosure of all copies of any written or recorded statements made by
 15 the defendant; the substance of any statements made by the defendant which the government
 16 intends to offer in evidence at trial; any recorded testimony of the defendant before the grand
 17 jury; any response by the defendant to interrogation; the substance of any oral statements
 18 which the government intends to introduce at trial; and any written summaries of the
 19 defendant’s oral statements contained in the handwritten notes of the government agents; any
 20 response to any Miranda warnings which may have been given to the defendant (see United
 21 States v. McElroy, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant
 22 that are discoverable under Fed. R. Crim. P. 16(a)(1)(A). This includes but is not limited to
 23 statements made during the execution of the search warrants herein. The Advisory Committee
 24 Notes as well as the 1991 amendments to Rule 16 make it clear that the Government must
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1 reveal all the defendant's statements, whether oral or written regardless of whether the
2 Government intends to introduce those statements;

3 (2) **Arrest Reports, Notes and Dispatch Tapes.** The defendant also specifically
4 requests that all arrest reports, notes and dispatch or any other tapes that relate to the
5 circumstances surrounding his arrest, the searches, or any questioning, if such reports have not
6 already been produced in their entirety, be turned over to him. This request includes, but is
7 not limited to, any rough notes, records, reports, transcripts or other documents in which
8 statements of the defendant or any other discoverable material is contained. This is all
9 discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963).
10 See also United States v. Johnson, 525 F.2d 999 (2d Cir. 1975), cert. denied, 424 U.S. 920
11 (1976); United States v. Lewis, 511 F. 2d 798 (D.C. Cir. 1975); United States v. Pilnick, 267
12 F. Supp. 791 (S.D.N.Y. 1967); Loux v. United States, 389 F.2d 911 (9th Cir.), cert. denied,
13 393 U.S. 867 (1968). Arrest reports, investigator's notes, memos from arresting officers,
14 dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are
15 available under Fed. R. Crim. P. 16(a)(1)(B) and (C), Fed. R. Crim. P. 26.2 and 12(I);
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17 (3) **Reports of Scientific Tests or Examinations.** Pursuant to Fed. R. Crim. P.
18 16(D), defendant requests the reports of all tests and examinations conducted upon the
19 evidence in this case, including but not limited to, the scientific chemical testing done upon
20 any drugs seized in this case to determine if it was indeed an illegal substance, and any
21 fingerprint testing done upon any evidence seized in this case, that it within the possession,
22 custody, or control of the government, the existence of which is known, or by the exercise of
23 due diligence may become known, to the attorney for the government, and which are material
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1 to the preparation of the defense or are intended for use by the government as evidence in
2 chief at the trial;

3 (4) **Brady Material.** The defendant requests all documents, statements, agent's
4 reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which
5 affects the credibility of the government's case. Impeachment as well as exculpatory evidence
6 falls within Brady's definition of evidence favorable to the accused. United States v. Bagley,
7 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976);
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9 5. **Any Information that May Result in a Lower Sentence under the United**
10 **States Sentencing Guidelines (U.S.S.G.).** As discussed above, this information is
11 discoverable under Brady v. Maryland, 373 U.S. 83 (1963). This request includes any
12 cooperation or attempted cooperation by the defendant, as well as any information that could
13 affect any base offense level or specific offense characteristic under Chapter Two of the
14 U.S.S.G. Also included in this request is any information relevant to a Chapter Three
15 adjustment, a determination of the defendant's criminal history, or any other application of
16 U.S.S.G.;
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18 (6) **The Defendant's Prior Record.** Evidence of prior record is available under
19 Fed. R. Crim. P. 16(a)(1)(B);
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21 (7) **Any Proposed 404 (b) Evidence.** Evidence of prior similar acts is discoverable
22 under Fed. R. Crim. P. 16(a)(1)(C) and Fed. R. Evid. 404(b) and 609. In addition, under Fed.
23 R. Evid. 404 (b), "upon request of the accused, the prosecution...shall provide reasonable
24 notice in advance of trial...of the general nature..." of any evidence the government proposes
25 to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests that such notice be
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1 given three weeks before trial in order to give the defense time to adequately investigate and
 2 prepare for trial;

3 (8) **Evidence Seized.** Evidence seized as a result of any search, either warrantless
 4 or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)(C).
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6 (9) **Request for Preservation of Evidence.** The defendant specifically requests
 7 that all dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise
 8 put out of the possession, custody, or care of the government and which relate to the arrest or
 9 the events leading to the arrest in this case be preserved. This request includes, but is not
 10 limited to, any samples used to run any scientific tests, any narcotics or other drugs, and any
 11 evidence seized from any third party. It is requested that the government be ordered to
 12 question all the agencies and individuals involved in the prosecution and investigation of this
 13 case to determine if such evidence exists, and if it does exist, to inform those parties to
 14 preserve any such evidence;
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17 (10) **Tangible Objects.** The defense requests, under Fed. R. Crim. P. 16(a)(2)(C),
 18 the opportunity to inspect and copy as well as test, if necessary, all other documents and
 19 tangible objects, including photographs, books, papers, documents, photographs, of building
 20 or places or copies of portions thereof which are material to the defense or intended for use in
 21 the government's case-in-chief, or were obtained from or belong to the defendant;
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23 (11) **Evidence of Bias or Motive to Lie.** The defendant requests any evidence that
 24 any prospective government witness is biased or prejudiced against the defendant, or has a
 25 motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987);
 26 United States v. Striffler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989);
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1 **(12) Impeachment Evidence.** The defendant requests any evidence that any
 2 prospective government witness has engaged in any criminal act, whether or not resulting in a
 3 conviction, and whether any witness has made a statement favorable to the defendant. See,
 4 Fed. R. Evid. 608, 609, and 613. Such evidence is discoverable under Brady v. Maryland, 373
 5 U.S. 83 (1963). See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior
 6 record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from
 7 witnesses' credibility). This includes criminal records of co-defendants and co-conspirators,
 8 whether indicted or not, U.S. v. Curry, 278 F. Supp. 508 (N.D.III, 1967);
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11 **(13) Evidence of Criminal Investigation of Any Government Witness.** The
 12 defendant requests any evidence that any prospective witness is under investigation by federal,
 13 state or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d
 14 Cir.), cert. denied, 474 U.S. 945 (1985);
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16 **(14) Evidence Affecting Perception, Recollection, Ability to Communicate, or**
 17 **Truth Telling.** The defense requests any evidence, including any medical or psychiatric
 18 report or evaluation, tending to show that any prospective witness' ability to perceive,
 19 remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever
 20 used narcotics or other controlled substance, or has ever been an alcoholic. United States v.
 21 Strifler, 851 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F. 2d 213, 224 (4th Cir.
 22 1980);
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24 **(15) Witness Addresses.** The defendant requests the name and last known address
 25 of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir.
 26 1987); United States v. Tucker, 716 F.2d 576 (9th Cir. 1983); United States v. Cook, 608 F.2d
 27 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to witnesses), cert. denied, 444
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1 U.S. 1034 (1980). The defendant also requests the name and last known address of every
 2 witness to the crime or crimes charged (or any overt acts committed in furtherance thereof)
 3 who will not be called as a government witness. United States v. Cadet, 727 F.2d 1453 (9th
 4 Cir. 1984);

6 **(16) Name of Witnesses Favorable to the Defendant.** The defendant requests the
 7 name of any witness who made an arguably favorable statement concerning the defendant or
 8 who could not identify him or who was unsure of his identity, or participation in the crime
 9 charged. This request includes but is not limited to statements by witnesses which do not
 10 mention this defendant. Jackson v. Wainwright, 390 F.2d 288(5th Cir. 1968); Chavis v. North
 11 Carolina, 637 f. 2D 213, 223 (4th Cir. 1980); Jones V. Jago, 575 F.2d 1164, 1168 (6th Cir),
 12 cert. denied, 439 U.S. 883 (1978); Hudson v. Blackburn, 601 F. 2d 785 (5th Cir. 1979), cert.
 13 denied, 444 U.S. 1086 (1980);

16 **(17) Statements Relevant to the Defense.** The defendant requests disclosure of any
 17 statement that may be “relevant to any possible defense or contention” that he might assert.
 18 United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982);

19 **(18) Jencks Act Material.** The defense requests all material to which defendant is
 20 entitled pursuant to the Jencks Act, 18 U.S.C Section 3500, reasonably in advance of trial,
 21 including dispatch tapes. A verbal acknowledgment that “rough” notes constitutes an accurate
 22 account of the witnesses’ interview is sufficient for the report or notes to qualify as a
 23 statement under Section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963).
 24 In United States v. Boshell, 952 F. 2d 1101 (9th Cir. 1991), the Ninth Circuit held that when an
 25 agent goes over interview notes with the subject of the interview the notes are then subject to
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1 the Jencks Act. The defense requests pre-trial production of Jencks material to expedite cross-
2 examination and to avoid lengthy recesses during trial;

3 (19) **Giglio Information.** Pursuant to Giglio v. United States, 405 U.S. 150 (1972),
4 the defendant requests all statements and/or promises, express or implied, made to any
5 government witnesses, in exchange for their testimony in this case, and all other information
6 which could arguably be used for the impeachment of any government witnesses;
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8 (20) **Personnel Records of Government Officers Involved in the Investigation,**
9 **Interview, or Analysis.** The defendant requests all citizen complaints and other related
10 internal affairs documents involving any of the law enforcement officers who were involved in
11 the investigation, arrest and interrogation of defendant, pursuant to Pitchess v. Superior Court,
12 11 Cal. 3d 531, 539 (1974). Because of the sensitive nature of these documents, defense
13 counsel will not be able to procure them from any other source;
14

15 (21) **Government Examination of Law Enforcement Personnel Files.** Defendant
16 requests that the government examine the personnel files and any other files within its
17 custody, care or control, or which could be obtained by the government, for all testifying
18 witnesses, including testifying officers. Defendant requests that these files be reviewed by the
19 government attorney for evidence of perjurious conduct or other like dishonestly, or any other
20 material relevant to impeachment, or any information that is exculpatory, pursuant to its duty
21 under United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). The obligation to examine files
22 arises by virtue of the defense making a demand for their review: the Ninth Circuit in
23 Henthorn remanded for in camera review of the agents' files because the government failed to
24 examine the files of agents who testified at trial. This Court should therefore order the
25 government to review all such files for all testifying witnesses and turn over any material
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1 relevant to impeachment or that is exculpatory to defendant prior to trial. Defendant
2 specifically requests that the prosecutor, not law enforcement officers, review the files in this
3 case. The duty to review the files, under Henthorn, should be the prosecutor's and not the
4 officers'. Only the prosecutor has the legal knowledge and ethical obligations to fully comply
5 with this request.
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7 (22) **Notice of evidence for Pretrial Motion purposes.** Defendant moves the court
8 to require the government to give notice of all evidence it intends to use in its case in chief
9 which may arguably be subject to a pretrial motion to suppress. FRCrP 12(d)(2).
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11 (23) **Continuing Order.** Defendant moves this Court to Order that all discovery
12 orders entered be continuing orders to disclose requiring the government to provide Defendant
13 with all discoverable information as soon as such information becomes available to the
14 government.
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19 Respectfully submitted,

20 Date: October 31, 2007

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22 s/Donald A. Nunn
23 Donald A. Nunn,
24 Attorney for Defendant Beatrice Arana
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CERTIFICATE OF SERVICE

I, Donald A. Nunn declare that:

I am, and was at the time of service of the papers herein referred to, over the age of 18 years and not a party to this action; and I am employed in the County of San Diego, California. My business address is 13426 Community Road. Poway, California.

I caused to be served by electronic mail on October 31, 2007

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL DISCOVERY

to the following:

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s/Donald A. Nunn

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